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Federal Communications Commission
Office of Secretary

901 - 15TH STREET, N.W.
WASHINGTON, D.C. 20005-2301
(202) 371-6000
FAX: (202) 371-6279

WRITER'S DIRECT DIAL
(202) 371-6206

February 11, 1998

BY HAND

Ms. Magalie Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: **Ex Parte Communication in IB Docket 95-59 and CS Docket 96-83**

Dear Ms. Salas:

On February 10, 1998, Lawrence Sidman and Sara Morris of Verner, Liipfert, Bernhard, McPherson & Hand, representing Philips Electronics North America Corporation ("Philips") and Thomson Consumer Electronics Corporation ("Thomson"), met with Susan Fox, Legal Advisor to Chairman Kennard, on issues pertaining to the pending *Further Notice of Proposed Rulemaking* in the above-captioned proceedings.

The substance of these meetings reflected the arguments advanced by Philips and Thomson in their joint comments and reply comments in this proceeding. The attached materials were distributed at the meeting, many of which were previously in the record but were provided for Ms. Fox's convenience.

In accordance with Section 1.1206 of the Commission's Rules, an original and one copy of this letter and one written ex parte presentation submitted on behalf of Philips and Thomson are being filed with your office.

Any questions concerning this matter should be directed to the undersigned.

Respectfully submitted,

Lawrence R. Sidman

Lawrence R. Sidman

Enclosures

cc w/o encl: Susan Fox

No. of Copies rec'd 241
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Table of Contents

Tab

Legislative History of Section 207

Section 207 of the Telecommunications Act of 1996 (Pub. L. 104-104)	1
House Commerce Committee Report Language	2
Conference Report Language	3
Comments of Philips Electronics N.A. Corp. and Thomson Consumer Electronics	4
Reply Comments of Philips Electronics N.A. Corp. and Thomson Consumer Electronics	5
White Paper on Case Law re Section 207 and the Fifth Amendment	6
Congressional Letters	
Congressional Black Caucus	7
Congressional Hispanic Caucus	8
Joint Letter of Reps. Tauzin, Boucher, Eshoo, Schaefer, Deal, Stearns, Gordon and Coburn	9
Rep. Mike Oxley	10
Fact Sheet on Rental Housing the United States	11

SEC. 205. DIRECT BROADCAST SATELLITE SERVICE.

(a) DBS SIGNAL SECURITY.—Section 705(e)(4) (47 U.S.C. 605(e)(4)) is amended by inserting “or direct-to-home satellite services,” after “programming.”

(b) FCC JURISDICTION OVER DIRECT-TO-HOME SATELLITE SERVICES.—Section 303 (47 U.S.C. 303) is amended by adding at the end thereof the following new subsection:

“(v) Have exclusive jurisdiction to regulate the provision of direct-to-home satellite services. As used in this subsection, the term ‘direct-to-home satellite services’ means the distribution or broadcasting of programming or services by satellite directly to the subscriber’s premises without the use of ground receiving or distribution equipment, except at the subscriber’s premises or in the uplink process to the satellite.”

SEC. 206. AUTOMATED SHIP DISTRESS AND SAFETY SYSTEMS.

Part II of title III is amended by inserting after section 364 (47 U.S.C. 362) the following new section:

47 USC 363.

“SEC. 365. AUTOMATED SHIP DISTRESS AND SAFETY SYSTEMS.

“Notwithstanding any provision of this Act or any other provision of law or regulation, a ship documented under the laws of the United States operating in accordance with the Global Maritime Distress and Safety System provisions of the Safety of Life at Sea Convention shall not be required to be equipped with a radio telegraphy station operated by one or more radio officers or operators. This section shall take effect for each vessel upon a determination by the United States Coast Guard that such vessel has the equipment required to implement the Global Maritime Distress and Safety System installed and operating in good working condition.”

Effective date.

Regulations.
47 USC 303 note.**SEC. 207. RESTRICTIONS ON OVER-THE-AIR RECEPTION DEVICES.**

Within 180 days after the date of enactment of this Act, the Commission shall, pursuant to section 303 of the Communications Act of 1934, promulgate regulations to prohibit restrictions that impair a viewer’s ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services.

TITLE III—CABLE SERVICES**SEC. 301. CABLE ACT REFORM.****(a) DEFINITIONS.—**

(1) DEFINITION OF CABLE SERVICE.—Section 602(6)(B) (47 U.S.C. 522(6)(B)) is amended by inserting “or use” after “the selection”.

(2) CHANGE IN DEFINITION OF CABLE SYSTEM.—Section 602(7) (47 U.S.C. 522(7)) is amended by striking “(B) a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way,” and inserting “(B) a facility that serves subscribers without using any public right-of-way.”

(b) RATE DEREGULATION.—

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COMMUNICATIONS ACT OF 1995

JULY 24, 1995.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BLILEY, from the Committee on Commerce,
submitted the following

REPORT

together with

ADDITIONAL AND DISSENTING VIEWS

[To accompany H.R. 1555]

[Including cost estimate of the Congressional Budget Office]

The Committee on Commerce, to whom was referred the bill (H.R. 1555) to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

CONTENTS

	Page
The amendment	2
Propose and summary	47
Background and need	48
Hearings	055
Committee consideration	56
Roll call votes	56
Committee oversight findings	64
Committee on Government Reform and Oversight	64
Committee cost estimates	64
Congressional Budget Office estimates	64
Inflationary impact statement	71
Section-by-Section Analysis of the Legislation	71
Changes in existing law made by the bill, as reported	127
Additional and dissenting views	202, 207, 213, 215, 216

Section 308. Restrictions on over-the-air reception devices

Section 308 directs the Commission to promulgate rules prohibiting restrictions which inhibit a viewer's ability to receive video programming from over-the-air broadcast stations or direct broadcast satellite services. The Committee intends this section to preempt enforcement of State or local statutes and regulations, or State or local legal requirements, or restrictive covenants or encumbrances that prevent the use of antennae designed for off-the-air reception of television broadcast signals or of satellite receivers designed for receipt of DBS services. Existing regulations, including but not limited to, zoning laws, ordinances, restrictive covenants or homeowners' association rules, shall be unenforceable to the extent contrary to this section.

The Committee notes that the "Direct Broadcast Satellite Service" is a specific service that is limited to higher power DBS satellites. This service does not include lower power C-band satellites, which require larger dishes in order for subscribers to receive their signals. Thus, this section does not prevent the enforcement of State or local statutes and regulations, or State or local legal requirements, or restrictive covenants or encumbrances that limit the use and placement of C-band satellite dishes.

TELECOMMUNICATIONS ACT OF 1996

JANUARY 31, 1996. Ordered to be printed

Mr. BLILEY, from the committee of conference,
submitted the following

CONFERENCE REPORT

[To accompany S. 652]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 652), to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment, insert the following:

SECTION 1. SHORT TITLE; REFERENCES.

(a) *SHORT TITLE.*—This Act may be cited as the “Telecommunications Act of 1996”.

(b) *REFERENCES.*—Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934 (47 U.S.C. 151 et seq.).

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

- Sec. 1. Short title; references.
- Sec. 2. Table of contents.
- Sec. 3. Definitions.

SECTION 207—RESTRICTIONS ON OVER-THE-AIR RECEPTION DEVICES

Senate bill

No provision.

House amendment

Section 308 of the House amendment directs the Commission to promulgate rules prohibiting restrictions which inhibit a viewer's ability to receive video programming from over-the-air broadcast stations or direct broadcast satellite services.

Conference agreement

The conference agreement adopts the House provision with modifications to extend the prohibition to devices that permit reception of multichannel multipoint distribution services.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)	
)	IB Docket No. 95-59
Preemption of Local Zoning)	
Regulation of Satellite)	
Earth Stations)	
)	
In the Matter of)	
)	
Implementation of Section 207 of)	CS Docket No. 96-83
the Telecommunications Act of 1996)	
)	
Restrictions on Over-the-Air Reception)	
Devices: Television Broadcast Service)	
and Multichannel Multipoint Distribution)	
Service)	

COMMENTS OF
PHILIPS ELECTRONICS NORTH AMERICA CORPORATION AND
THOMSON CONSUMER ELECTRONICS, INC.

Lawrence R. Sidman
Kathy D. Smith
Verner, Liipfert, Bernhard,
McPherson & Hand, Chtd.
901 - 15th Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 371-6000

Counsel for Philips
Electronics N.A. Corporation
and Thomson Consumer
Electronics, Inc.

September 27, 1996

TABLE OF CONTENTS

EXECUTIVE SUMMARY	i
COMMENTS	1
I. PHILIPS AND THOMSON	1
II. THE TEXT AND LEGISLATIVE HISTORY OF SECTION 207 MAKE CLEAR THAT PRIVATE RESTRICTIONS ON DBS SERVICES ARE PREEMPTED	4
III. CONGRESS AND THE COMMISSION HAVE THE LEGAL AUTHORITY TO PREEMPT LANDLORDS' RESTRICTIONS ON DBS ACCESS	7
IV. PREEMPTING LANDLORDS' RESTRICTIONS ON ACCESS TO DBS SERVICE IS NOT A TAKING	9
V. SECTION 207 RECOGNIZES THAT VIEWERS' FIRST AMENDMENT INTERESTS ARE PARAMOUNT	11
VI. IT IS TECHNICALLY FEASIBLE FOR A DBS SERVICE PROVIDER TO OFFER PROGRAMMING TO APARTMENT DWELLERS THROUGH A SINGLE DISH ANTENNA ON THE ROOF AND SUCH EQUIPMENT IS WIDELY AVAILABLE COMMERCIALY	14
CONCLUSION	17
APPENDIX	

Executive Summary of Comments by Philips Electronics North
America Corporation and Thomson Consumer Electronics, Inc.
in IB Docket No.95-59

Philips and Thomson believe that the benefits of new digital technologies like direct broadcast satellite service should be available to all American consumers. Section 207 of the Telecommunications Act of 1996 promotes this goal. It instructs the Federal Communications Commission to issue regulations prohibiting restrictions that "impair a viewer's ability to receive" programming services via the use of DBS dish antennas, and over-the-air broadcast and wireless cable antennas. Congress clearly stated its intent that this section preempt both private contractual restrictions on the use of DBS dish antennas as well as local zoning restrictions.

In the Second Further Notice in IB Docket No. 95-59, the Commission raises a host of questions regarding whether to extend its preemption rules to condominium owners and renters. There should be no doubt that the preemption rules should apply to condominium and apartment dwellers in order to implement Section 207 faithful to its letter and spirit. Otherwise, millions of renters and some condominium unit owners will continue to be subject to myriad private restrictions on their access to new video programming technologies. Moreover, any distinction between single family homeowners and condominium owners or renters would be wholly artificial and would unfairly deny millions of viewers access to DBS service, in direct contravention of the 1996 Act's explicit purpose to expand access to telecommunications services to all Americans. It would

engraft onto the legislation a distinction based on economic status of the viewer nowhere to be found in Section 207 and utterly at odds with Congressional intent throughout the 1996 Act to avoid creation of information "haves" and information "have nots."

Both Congress and the Commission have the legal authority to preempt private contractual restrictions on the use of DBS dish antennas by tenants. Congress' power to alter contractual relationships pursuant to its constitutional authority to regulate interstate commerce is well-established. The courts have also upheld the Commission's authority to modify private leasehold arrangements. Moreover, preempting such restrictions pursuant to Section 207 is not an unconstitutional taking under the Fifth Amendment. Even if landlords had a colorable basis for such a taking claim, their asserted interests do not outweigh the countervailing rights that their tenants possess under the First Amendment as viewers of electronic media.

Finally, contrary to the claims of landlords and condominium associations, it is technically feasible to provide DBS to apartment dwellers with the use of only a single DBS dish antenna on the roof of the building. Equipment to wire apartment buildings in such a configuration is widely available commercially and is currently in use.

Therefore, Philips and Thomson urge the Commission to extend its current preemption rules to cover all viewers, including all tenants and residents of multiple dwelling units whether

-iii-

apartment buildings or condominiums. Only by extending the rules to cover all viewers will the Commission satisfy the letter and spirit of Section 207 of the 1996 Act.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
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COMMENTS OF
PHILIPS ELECTRONICS NORTH AMERICA CORPORATION AND
THOMSON CONSUMER ELECTRONICS, INC.

Philips Electronics North America Corporation ("Philips") and Thomson Consumer Electronics, Inc. ("Thomson") submit comments in the above-captioned Further Notice of Proposed Rulemaking ("Second Further Notice") to implement Section 207 of the Telecommunications Act of 1996.

I. Philips and Thomson

Philips manufactures television sets and other consumer electronic products, semiconductors, diagnostic imaging systems and other professional equipment marketed under many familiar brand names including Philips, Magnavox and Norelco. Philips has long been a pioneer in the telecommunications and entertainment industries and also played a pivotal role in the development of

digital high definition television (HDTV) through the Grand Alliance. Philips manufactures and distributes DBS dish antennas for Primestar.

Thomson also manufactures and distributes television sets and other consumer electronics products under the well-known RCA, General Electric and ProScan brand names. In addition to its key role in the development of HDTV technology through the Grand Alliance, Thomson developed in cooperation with DIRECTV the first direct broadcast satellite (DBS) receiving system in the United States -- the DSS® system. Thomson has manufactured more than 3 million units since 1994.

Philips and Thomson believe that the benefits of new digital technologies like DBS should be available to all American consumers as soon as possible. Section 207 of the Telecommunications Act of 1996 ("1996 Act")^{1/} promotes this goal. It instructs the Federal Communications Commission ("Commission") to issue regulations prohibiting restrictions that "impair a viewer's ability to receive" programming services via the use of DBS dish antennas, and over-the-air broadcast and wireless cable antennas. Congress clearly stated its intent that this statutory provision preempt both private contractual restrictions on the use of DBS dish antennas as well as local zoning restrictions.

^{1/} Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

In the Second Further Notice in IB Docket No. 95-59, the Commission raises a host of questions regarding whether to extend its preemption rules to condominium owners and renters. Philips and Thomson strongly urge the Commission to extend its rules to these large categories of viewers. Otherwise, millions of renters and some condominium unit owners will continue to be subject to myriad private restrictions on their access to new video programming technologies. Moreover, any distinction between single family homeowners and condominium owners or renters would be wholly artificial and would unfairly deny millions of viewers access to DBS service, in direct contravention of the 1996 Act's explicit purpose to expand access to telecommunications services to all Americans. It would engraft onto the legislation a distinction based on economic status of the viewer nowhere to be found in Section 207 and utterly at odds with Congressional intent throughout the 1996 Act to avoid creation of information "haves" and information "have nots." Moreover, it would thwart the purpose of Section 207: to knock down yet another barrier to the development of robust competition in the multichannel video programming distribution market. By permitting the continuation of restrictions on DBS dish antennas in multiple dwelling units, the Commission would be an accomplice to limiting significantly market penetration of DBS service. Nothing could stray farther from the mandate Congress imposed on the Commission in enacting Section 207.

Philips and Thomson urge the Commission to extend its current preemption rules to cover all viewers, including all tenants and residents of multiple dwelling units whether apartment buildings or condominiums. Only by extending the rules to cover all viewers will the Commission satisfy the letter and spirit of Section 207 of the 1996 Act.

II. The Text and Legislative History of Section 207 Makes Clear That Private Restrictions on DBS Services Are Preempted.

Nothing in the text or legislative history of the Act supports the notion of applying Section 207 differently to viewers who own homes and viewers who rent. Section 207 requires the Commission to: "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for . . . direct broadcast satellite services."^{2/} According to the text, Section 207 applies with regard to restrictions on viewers, not homeowners.

Similarly, the legislative history is devoid of any reference to type of property ownership or any basis for relegating renters to second class status not entitled to the benefits conferred by Section 207 upon "viewers." It states that Section 207 was intended:

to preempt enforcement of . . . restrictive covenants or encumbrances that prevent the use of . . . satellite receivers designed for receipt of DBS services.
Existing regulations, including but not limited to
. . . restrictive covenants or homeowners' association

^{2/} Pub. L. No. 104, 104th Cong., 1st Sess. § 207, 110 Stat. 56, 114 (1996).

rules, shall be unenforceable to the extent contrary to this section.^{3/}

Nothing in Section 207 or the Act's legislative history supports any distinction between viewers who are homeowners and viewers who are renters. To the contrary, the Act and the legislative history both clearly state that the purpose of the legislation is to increase access of all Americans to telecommunications services.^{4/} Any implementing regulations permitting restrictions on non-homeowners' DBS access would fly in the face of law and congressional intent.

Moreover, such distinctions would be invidiously discriminatory. According to the most recently compiled information by the U.S. Census Bureau, approximately 35 million American households (roughly 35 percent) live in rented housing.^{5/} Of these 35 million renter households, about one-

^{3/} H.R. Rep. 104, Part 1, 104th Cong., 1st Sess. 123-124 (1995).

^{4/} See e.g., Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (providing in the preamble: "[a]n Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies"); see also, H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 1 (1996) (providing that the legislation is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition").

^{5/} See Second Quarter 1996: Press Release, U.S. Census Bureau, Table 3 - Estimates of Total Housing Inventory for the United States: Second Quarter 1996 and 1995 (released July 22, 1996) (available through the U.S. Census Bureau's website at <http://www.census.gov.ftp/pub/hhes/housing/hvs/q296prss.html>).

quarter of them are low-income.^{6/} Two-thirds of single mothers must rent their housing.^{7/} Thus, the Commission's proposed distinction based on home ownership would create the ultimate "have" and "have not" situation by denying many American families access to important communications services based on their economic status.

It would also have a disproportionate impact on minority households. According to U.S. Census Bureau data, approximately 35 percent of White households rent. By contrast, 57 percent of Black households, 58 percent of Hispanic households, and almost half of the Native American population, including American Indian, Eskimo, Aleut, and Pacific Islander households, rent.^{8/} The impact on minority households of any home ownership distinction in implementing Section 207 is fundamentally at odds with Section 104 of the 1996 Act -- the newly enacted nondiscrimination provision which prohibits discrimination in the implementation of the Communications Act of 1934.^{9/} It also

6/ See Grall, Timothy S., "Our Nation's Housing in 1993," U.S. Bureau of the Census, Current Housing Reports, H121/95-2, U.S. Government Printing Office, Washington, D.C. (1995).

7/ Id. at 5.

8/ Id. at p. 19.

9/ See Telecommunications Act of 1996, § 104, 110 Stat. 56, 86(1996) (amending 47 U.S.C. § 151 to provide: "[f]or the purposes of regulating interstate and foreign commerce in communications by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin or sex, a rapid, efficient, Nation-wide, and world wide wire and radio communication service") (emphasis added).

ignores the fact that Section 207 was patterned after Civil Rights legislation prohibiting discrimination in private contracts in the sale or rental of housing. The reference in Section 207's legislative history to rendering unenforceable private covenants restricting access to DBS service purposefully tracks the cases rendering unenforceable racially restrictive covenants.^{10/}

III. Congress and the Commission Have the Legal Authority to Preempt Landlord's Restrictions on DBS Access.

Landlords of rental properties have erroneously asserted that the Commission may not preempt private contractual restrictions on the use of DBS dish antennas by tenants. They incorrectly contend that the Commission may not issue regulations that impinge upon private contractual provisions between landlords and tenants that restrict tenants' access to DBS service because Congress lacks authority to affect such contracts. A long line of judicial precedents, however, reaches exactly the opposite conclusion. The courts agree that: (1) Congress may enact legislation modifying the rights of private parties reflected in contracts; (2) such legislation is not an unconstitutional taking; and (3) the Commission may promulgate regulations in accordance with such legislation. Preempting enforcement of private restrictions on DBS access is clearly

^{10/} See Mayers v. Ridley, 465 F.2d 630 (D.C. Cir. 1972) (per curium) (permitting homeowners' challenge to legality of racially restrictive covenants) (citing Shelly v. Kraemer, 334 U.S. 1 (1948) (holding racially restrictive covenants judicially unenforceable)).

within the power of Congress, and Commission regulations implementing such a legislative preemption are lawful.

Congress' power to alter contractual relationships pursuant to its constitutional authority to regulate interstate commerce is firmly established. As the Supreme Court recently stated:

Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.^{11/}

Retroactive application of statutes modifying contractual rights that predated the legislation is also entirely permissible.^{12/}

No one seriously challenges Congress' authority to regulate access to telecommunications services.^{13/}

11/ Connolly v. Pension Benefit Guarantee Corp., 475 U.S. 211, 223-224 (1986). See also Concrete Pipe & Prods. v. Construction Laborers Pension Trust, 508 U.S. 602, 639-640 (1993) (federal legislation may modify existing contractual obligations); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16 (1975) (Congress has right to enact legislation altering the "rights and burdens" between private parties); Norman v. Baltimore & Ohio R.R. Co., 294 U.S. 240, 309-310 (1935) ("no constitutional ground for denying to the Congress the power expressly to prohibit and invalidate contracts, although previously made, and valid when made, when they interfere with the carrying out of the policy it is free to adopt"); Louisville & Nashville R.R. Co. v. Mottley, 219 U.S. 467, 482 (1911) ("contracts must be understood as made in reference to the possible exercise of the rightful authority of the government").

12/ See PBGC v. R.A. Gray & Co., 467 U.S. 717 (1984) (upholding retroactive application of ERISA amendments).

13/ See Congressional Research Service, The Constitution of the United States: Analysis and Interpretation 174 (1982) (Federal Communications Act of 1934 has "evoked no basic constitutional challenge.").

Likewise, the Commission has the legal authority to carry out Congress' mandate to preempt private leasehold restrictions on DBS dish antennas. The Commission's authority to modify private leasehold agreements is well recognized by the courts. Under the Pole Attachment Act, the Commission, in implementing an act of Congress, was authorized by Congress to regulate leasehold contracts between utility-pole owners and cable companies for space on the owner's poles.^{14/} The Florida Power Corporation unsuccessfully challenged the Common Carrier Bureau's authority to regulate these rates. On review, the full Commission stated:

It is well established that contracts made in areas of governmental regulation are subject to modification by subsequent legislation. . . . The ability of Congress to react to changing conditions and to legislate in the public interest cannot be restricted by private agreements. Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution.^{15/}

IV. Preempting Landlord's Restrictions on Access to DBS Service is not an Unconstitutional Taking.

Landlords and condominium associations have also argued that any attempts by the Commission to preempt or limit restrictions on tenants' or unit owners' access to DBS service is a regulatory taking under the Fifth Amendment to the Constitution. Takings jurisprudence clearly shows that this is not the case.

^{14/} 47 U.S.C. § 224.

^{15/} Teleprompter Corp. and Teleprompter Southeast, Inc. v. Florida Power Corp., File No. PA-81-0008 et al., 1984 FCC LEXIS 1874 (Oct. 3, 1984), rev'd on other grounds sub nom Florida Power Corp. v. FCC, 772 F.2d 1537 (11th Cir. 1985), rev'd on other grounds by FCC v. Florida Power Corp., 480 U.S. 245 (1987) (leaving intact the Commission's original decision).

Preempting such restrictions pursuant to Section 207 of the Act is not an unconstitutional taking.

If Congress has the constitutional authority to enact a statute, application of that statute by regulation cannot be defeated by private contractual provisions.^{16/} "For the same reason, the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking."^{17/} In the case of Commission regulations that specifically modified leasehold agreements, the Supreme Court held in Florida Power Corp. that the Commission's regulations pursuant to the Pole Attachments Act, regulating the rates utility pole owners could charge companies for space on their poles, did not effect a taking of the pole owner's property.^{18/} The Court concluded that "statutes regulating economic relations of landlords and tenants are not per se takings."^{19/}

^{16/} Connolly, 475 U.S. at 224.

^{17/} Id.

^{18/} Florida Power Corp., 480 U.S. at 245.

^{19/} Id. at 252. The Court's opinion in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), is inapposite, because that case involved a state statute that permitted the physical invasion and occupation of the owners' property by third parties. The Loretto court specifically noted that the holding did not extend to the issue of regulatory modifications of rights between landlords and tenants. Id. at 439-441 n.19; see also Yee v. City of Escondido, 503 U.S. 519, 527 (1992) (holding in Loretto limited to physical takings when "government authorizes a compelled physical invasion of property").

Government regulation, so long as it is not excessive to accomplish a legitimate government purpose, does not rise to the level of a taking. Consequently, governments have wide latitude to issue regulations governing: (1) prices of rental property, so long as a reasonable rate of return is permitted to the landlord; and (2) health, safety, aesthetic and other regulations that fall into governments' "police powers" unless they reduce by a high percentage the value of the landlord's property.^{20/} For example, the Supreme Court has concluded that no taking occurs where laws "merely regulate [the owner's] use of land by regulating the relationship between landlord and tenant."^{21/} In such circumstances, the courts generally do not find a taking, unless the government regulation at issue: (1) allows a significant physical occupation of the owner's property by the government, a governmental agent, or the public; (2) the harm to the owner's property is a high percentage of its total value; or (3) the loss to the owner outweighs the gain to the public.^{22/}

20/ Ralph E. Boyer et al., The Law of Property § 12.2 (1991); see also Pennell v. City of San Jose, 485 U.S. 1, 8-11 (1988) (outlining elements of regulatory takings); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. at 440 (reaffirming government authority to enforce building and fire codes and to require installation of mailboxes in apartment buildings); Penn Central Transp. Co. v New York City, 438 U.S. 104, 124 (1978) (outlining three-factor test for takings analysis).

21/ Yee, 503 U.S. at 519.

22/ See generally John E. Nowak et al., Constitutional Law § 11.12(e) (1986); see also Yee, 503 U.S. at 522 (takings analysis "necessarily entails complex factual assessments of the purposes and economic effects of government actions").